Office-Supreme Court, U.S.
FILED
DEC 10 1965
JOHN F. DAVIS, CLERK

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693-985—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 192

UNITED STATES OF AMERICA, EX REL.
L. B. BIXION, PETITIONER

v.

JAMES V. RYAN, UNITED STATES MARSHAL FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 201 F. Supp. 802. The opinion of the Court of Appeals is reported at 314 F. 2d 389.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1963. A petition for rehearing was denied on March 18, 1963. The petition for a writ of certiorari was filed on June 7, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals and the District Court abused their discretion by relying in part on determinations made in prior proceedings involving substantially the same issues.

2. Whether the District Court erred in deciding this case without first conducting an evidentiary hearing where petitioner had had opportunity in the prior proceedings to present evidence.

STATEMENT

The pertinent facts are set forth in *United States ex rel. Binion* v. *O'Brien*, 273 F. 2d 495 (C.A. 3), certiorari denied, 363 U.S. 812; and *United States ex rel. Binion* v. *United States Marshal for the District of Nevada*, 292 F. 2d 494 (C.A. 9), certiorari denied, 368 U.S. 919.

On September 3, 1952, petitioner entered a plea of nolo contendere in the United States District Court for the District of Nevada to an indictment charging income tax evasion for the year 1949, in violation of 26 U.S.C. 145(b). He was sentenced to pay a fine of $15,000; imposition of a prison sentence was suspended, and he was placed on probation for five years.

On December 14, 1953, in the United States District Court for the Western District of Texas, petitioner entered a plea of guilty to two indictments charging income tax evasion for the years of 1947 and 1948. The court sentenced him to three concurrent terms of five years each, to be followed by probation for three years, and imposed a fine of $20,000. Service of the sentences commenced on December 14, 1953.

In August 1956, petitioner filed a motion under 28 U.S.C. 2255 to correct the Texas sentences, alleging that they were excessive under the controlling statute. This motion was denied and an appeal was taken to the Court of Appeals for the Fifth Circuit. At that time *Achilli* v. *United States*, 353 U.S. 373, involving the same statutory issue under the income tax laws, was pending before this Court, and the Court of Appeals entered an order deferring determination of petitioner's case pending disposition of the *Achilli* case. On March 11, 1957, this Court granted petitioner's release on bail pending the *Achilli* decision, and on March 19, 1957, petitioner was released on $25,000 cash bond by the Texas District Court. On that date, there remained three months and twenty days to be served on the Texas sentences prior to eligibility for mandatory release under the provisions of 18 U.S.C. 4164.[1] Petitioner had previously been de-

[1] The Court of Appeals so computed the time in its opinion in this case in 273 F. 2d at 497 and thus the government accepts this computation as binding. Actually, petitioner should have been considered as having 119 days remaining to be served in confinement at that point, which would have been three months and twenty-seven days, pursuant to the following computation: petitioner commenced service of his five year sentence on December 14, 1953 and thus his maximum term was to have been December 13, 1958. He was credited with 480 days of good behavior time and 35 days of extra good time and this would have made his minimum term release date July 16, 1957. Thus, when he was released on March 19, 1957 he had remaining 119 days of confinement before he would have reached his minimum release date. Petitioner's statement (Pet. 10) that the government's computation of three months and twenty-seven days erroneously fails to credit him with time spent in custody prior to his arrival at the penitentiary on December 19, 1953 is clearly without foundation.

nied parole. On May 27, 1957, this Court decided the *Achilli* case adversely to petitioner's contention and on June 28, 1957, the Fifth Circuit affirmed the District Court's denial of petitioner's motion to correct sentence. *Binion v. United States*, 245 F. 2d 466. On October 14, 1957, this Court denied certiorari, 355 U.S. 834.

On October 16, 1957, petitioner surrendered to the United States Marshal at Philadelphia, Pennsylvania, although he resided and had previously been under supervision in Las Vegas, Nevada. On the same day, he filed a petition for a writ of habeas corpus in the Eastern District of Pennsylvania, and applied for release on bail pending hearing on the petition. That court authorized his release on $5,000 bail on the same day and issued a rule to show cause why the writ should not be granted. On November 3, 1958, the case was called for hearing and was submitted on briefs. Sixteen exhibits and a stipulation signed only by the relator's counsel were admitted into evidence. No witnesses were called by either side.[1]

The evidence showed the following: Under the five-year period of probation granted by the District Court in Nevada on September 3, 1952, petitioner was directed to, and did, report to the United States Probation Officer for that district once every sixty days prior to commencement of his Texas sentence. Upon his release on bail from the United States Penitentiary at Leavenworth on March 19, 1957, he again

[1] The evidence adduced at this hearing and that adduced at the hearing of August 15, 1960, *supra*, p. 7, are practically identical.

began reporting to his probation officer who instructed him to report once a week, a request with which petitioner complied.[1] On September 3, 1957, the five-year probationary period terminated, and on September 13, 1957, an order to that effect was signed by the court. The probation officer nevertheless instructed Binion to continue reporting weekly pending clarification of his status. On September 19, 1957, the probation officer wrote to the United States Board of Parole stating that petitioner was continuing to report to him and requesting information as to his status. The Board of Parole replied on October 21, 1957, advising that petitioner was not reporting pursuant to any order or request by the Board; that he was not in the custody of the Attorney General while free on bail; and that, consequently, there was no requirement by the Board that he report to the probation officer. The latter so advised petitioner on October 23, 1957, and petitioner did not report thereafter.

Upon this evidence, the United States District Court for the Eastern District of Pennsylvania found that petitioner had reported to the probation officer in the same manner as one under parole supervision.[2]

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[1] It should be noted, however, that during the seven-month period between March 19, 1957, and October 23, 1957, petitioner was away from the District of Nevada on six separate occasions, including trips to Philadelphia, Pennsylvania, Mecca, California, and Jordan, Montana. On one absence he stayed at his ranch in Montana for a period of two and one-half months and made contact with the probation officer by telephone.

[2] After the original petition for a writ of habeas corpus was filed, the probation officer wrote to petitioner's attorney, stating that petitioner reported prior to October 23, 1957, in the same manner as he "would require a parolee [or conditional releasee] to report for supervision."

and that, although petitioner was not on "parole de jure, he was so de facto and bound to conduct himself accordingly." Since petitioner had reported for a period greater than the time remaining to be served in physical custody under the Texas sentence, the court concluded that service of the confinement portion of petitioner's sentence had been completed and that he was entitled to be released. On December 22, 1958, an order was signed discharging petitioner from custody. On February 19, 1959, the government filed a notice of appeal.

On December 9, 1959, the Court of Appeals for the Third Circuit reversed the order of the District Court, holding that petitioner was not entitled to credit for the period he was on probation, *i.e.*, from March 19 to September 3, 1957. It concluded, however, that he was entitled to credit for the period from the latter date to October 23, 1957. *United States ex rel. Binion* v. *O'Brien*, 273 F. 2d 495. Petitioner petitioned for a rehearing, but this was denied. Certiorari was denied on June 6, 1960. 363 U.S. 812.

On June 10, 1960, petitioner attempted to surrender to the Deputy United States Marshal at Las Vegas, Nevada, but the Marshal refused to take him into custody.[5] On June 13, 1960, the Court of Appeals for

[5] Mr. Harry E. Claiborne, petitioner's attorney at Las Vegas, testified at the hearing on August 15, 1960, in the District of Nevada (see *infra*, p. 7) that when he brought petitioner to Deputy Marshal Sampson on June 10, 1960, Mr. Sampson stated that he did not know what to do with petitioner, but that shortly afterward the Deputy Marshal stated that the United States Attorney advised him not to hold petitioner. Deputy Marshal Sampson testified that Mr. Claiborne appeared

the Third Circuit issued its mandate, and on July 5, 1960, the United States District Court for the Eastern District of Pennsylvania ordered petitioner remanded to the custody of the Attorney General. On July 12, 1960, petitioner was taken into custody, but he was immediately released on a writ of habeas corpus issued by the United States District Court for the District of Nevada and admitted to bail.

On August 15, 1960, a hearing has held in the District of Nevada to determine the validity of petitioner's detention. At that time the same exhibits which had been received in evidence by the Pennsylvania District Court and reviewed by the Third Circuit on petitioner's prior appeal were again introduced into evidence. In addition, Chief Probation Officer Hubert A. Boyd testified that petitioner "reported to my office * * * as a probationer" and that he (Boyd) had talked with the sentencing judge who suggested that he handle "this case on probation in the same manner as * * * any case here in Nevada."

On November 9, 1960, the District Court ordered the writ of habeas corpus discharged and petitioner remanded to the custody of the Marshal. Petitioner immediately filed a notice of appeal and was released on bail. The Court of Appeals affirmed, and certiorari was denied on November 20, 1961. 368 U.S. 919.

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with petitioner on June 10, 1960, and advised that he was surrendering petitioner; that the attorney remained about ten or fifteen minutes; that he, Sampson, talked with the United States Attorney in his office in the presence of both petitioner and his attorney; that he advised Mr. Claiborne he would not accept custody of petitioner; and that he in no way restrained petitioner's movements or liberty.

On November 21, 1961, petitioner presented himself to a deputy of the respondent marshal and announced that he was surrendering pursuant to the order entered on July 5, 1960, by the Pennsylvania District Court. Petitioner then immediately filed a petition for a writ of habeas corpus in the Eastern District of Pennsylvania and that District Court ordered him admitted to bail. On December 22, 1961, after answer but without holding a hearing, the court dismissed the petition, revoked bail as of January 3, 1962, and directed appellant to surrender himself into custody on that date.* The Court of Appeals affirmed on February 18, 1963.

ARGUMENT

Petitioner once again seeks certiorari to review the denial by lower federal courts of his claims to credits (as time having been served in confinement) equivalent to the approximately two months remaining on the confinement portion of his sentence. His claims for credits of 24 days and 58 days had been litigated in the Third and Ninth Circuits and his claim for a credit of 32 days had been litigated in the Ninth Circuit previous to the commencement of the instant petition for a writ of habeas corpus in the Third Circuit based on these same claims. Petitioner contends that the United States District Court for the Eastern District of Pennsylvania erred in not grant-

*This order was subsequently modified to permit petitioner to remain free on bail until the time provided by law for filing a notice of appeal would expire, or, if notice of appeal were timely filed, pending final determination on appeal. Notice of appeal was filed February 19, 1962.

Circuit, 314 F. 2d 389 at 391, 292 F. 2d at 497–498. It is also true that the issue of petitioner's entitlement to any credit of confinement time for the period between March 19, 1957, and September 3, 1957, had been decided against petitioner by the Third Circuit prior to the aforesaid petition for rehearing when it held in its opinion that (273 F. 2d at 497):

> Since he had a duty to report under the Nevada probation order until September 3, 1957, he cannot be given credit on his later sentence for *reporting* done prior to that date. *The frequency of the reporting* during this period does not create a different status * * *. [Emphasis added]

Furthermore, the Ninth Circuit also rejected petitioner's claim to the 58 days between December 22, 1958, and February 19, 1959. Thus, it is apparent that the courts below did not err in citing their reliance on the prior adjudication of these issues and that petitioner's reliance on *Sanders* v. *United States*, 373 U.S. 1, is misplaced. Petitioner contends (Pet. 17) that in this case the standard of "full and rounded analysis" set by *Sanders* had not been met. But this Court explicitly pointed out in that case "that these rules are not operative in cases where the second or successive application is shown, on the basis of the application, files, and records of the case alone, conclusively to be without merit. 28 U.S.C. §§ 2243, 2255. In such a case the application should be denied without a hearing." 373 U.S. at p. 15. The Court also restated, with apparent approval, the rule of *Salinger* v. *Loisel*, 265 U.S. 224, 231, that, in denying petitions

for writs of habeas corpus, "[a]mong the matters which may be considered, and even given controlling weight, are * * * a prior refusal to discharge on a like application."

2. Petitioner also contends that he was entitled to an evidentiary hearing in the District Court (Pet. 11–14). In the face of the record in this case that petitioner had had ample opportunity to present all evidence pertinent to these claims in his hearings of November 3, 1958, and August 15, 1960, and that petitioner does not show that he would have had any additional relevant evidence to offer at such a hearing, there clearly was no abuse of discretion in deciding this case without a hearing. Petitioner alleges (Pet. 11) that, with respect to the 24-day claim, he was subjected to restraints not reflected by the probation officer's log, but does not explain why such evidence was not introduced at the two previous hearings, nor how it is relevant in light of the previous decision of the Third Circuit denying *any* credit for this period. Petitioner also offers to prove that the marshal in Nevada was aware of the denial of certiorari during the 32-day period when petitioner attempted to surrender to him, but again petitioner fails to demonstrate how this would be relevant in view of the fact that petitioner was surrendering merely to file another petition for a writ of habeas corpus and no restraint in fact ensued.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
BURKE MARSHALL,
Assistant Attorney General.
HAROLD H. GREENE,
GERALD P. CHOPPIN,
Attorneys.

JULY 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963